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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,	)	
	)	2:09-CR-0079-KJD(RJJ)
Plaintiff,	)	
	)	
v.	)	RESPONSE IN OPPOSITION TO
	)	DEFENDANT HAROLD CALL'S
HAROLD CALL,	)	MOTION TO SUPPRESS
	)	EVIDENCE
Defendant.	)	
_____	)	

Comes now the United States of America by and through its attorneys, Gregory A. Brower, United States Attorney for the District of Nevada, and J. Gregory Damm, Assistant United States Attorney, and responds in opposition to defendant Harold Call's Motion to Suppress Evidence.

Defendant Call challenges the sufficiency of the affidavit in support of the search of his residence and requests the Court to grant him a Franks hearing to allow him call and examine witnesses in an effort to undermine the affidavit. Defendant contends that the materials seized from his residence should be suppressed because the affidavit in support of the search warrant for his residence omitted material information and included misstatements. Generally, defendant's argument has two primary points. Defendant first claims that the affidavit omitted information concerning the background of the confidential informants. Defendant also claims the affidavit omitted conversations between the confidential informant and the defendant where allegedly the informant repeatedly asked the defendant to manufacture auto sears, inducing the defendant to commit the crimes alleged.

1 The material issue before the Court should be whether affiant presented enough  
 2 information to the Magistrate Judge to provide the Court with probable cause to believe that evidence  
 3 that might further the Government's case against defendant Call existed at his residence. As the Ninth  
 4 Circuit explained in United States v. Fernandez, 388 F.3d 1199 (9<sup>th</sup> Cir 2004)

5 In the context of the determination of whether a magistrate judge had a substantial  
 6 basis to conclude that a search warrant was supported by probable cause, probable  
 7 cause exists when, considering the totality of the circumstances, the affidavit shows  
 that there is a fair probability that contraband or evidence of a crime will be found in  
 a particular place.

8 The Ninth Circuit again reaffirmed this standard in United States v. Davis, 530 F.3d 1069 (9<sup>th</sup> Cir.  
 9 2008), explaining that "[p]robable cause exists when, under totality of the circumstances, there is fair  
 10 probability that contraband or evidence of crime will be found in a particular place."

11 The Supreme Court in Franks v. Delaware, 438 U.S. 154, 171-72 (1978), held that  
 12 there is "a presumption of validity with respect to the affidavit supporting the search warrant." The  
 13 Court held that for a defendant to challenge an affidavit and obtain an evidentiary hearing, the  
 14 defendant's

15 attack must be more than conclusory and must be supported by more than a mere  
 16 desire to cross-examine. There must be allegations of deliberate falsehood or of  
 17 reckless disregard for the truth, and those allegations must be accompanied by an offer  
 of proof. They should point out specifically the portion of the warrant affidavit that  
 is claimed to be false; and they should be accompanied by a statement of supporting  
 reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be  
 18 furnished, or their absence satisfactorily explained. The deliberate falsity or reckless  
 disregard whose impeachment is permitted today is only that of the affiant, not of any  
 19 nongovernmental informant. Finally, if these requirements are met, and if, when  
 material that is the subject of the alleged falsity or reckless disregard is set to one side,  
 20 there remains sufficient content in the warrant affidavit to support a finding of  
 probable cause, no hearing is required.

21 In United States v. Craighead, 539 F.3d 1073, 1080 (9<sup>th</sup> Cir. 2008) decided last year,  
 22 the Ninth Circuit reaffirmed the principles of Franks, stating:

23 A defendant is entitled to an evidentiary hearing if he "makes a substantial preliminary  
 24 showing that a false statement knowingly and intentionally, or with reckless disregard  
 for the truth, was included by the affiant in the warrant affidavit, and if the allegedly  
 25 false statement is necessary to the finding of probable cause. *Franks*, 438 U.S. at 155-  
 56, 98 S.Ct. 2674. To justify a hearing, a defendant must make specific allegations,  
 26 allege a deliberate falsehood or reckless disregard for the truth, and accompany such  
 a claim with a detailed offer of proof. *United States v. Kiser*, 716 F.2d 1268, 1271 (9<sup>th</sup>  
 Cir.1983).

1 539 F.3d 1073, 1080 (9th Cir. 2008). In United States v. DiCesare, the Ninth Circuit formulated the  
 2 following test:

3           There are five requirements for a sufficient motion for a *Franks* hearing: (1) the  
 4 defendant must allege specifically which portions of the warrant affidavit are claimed  
 5 to be false; (2) the defendant must contend that the false statements or omissions were  
 6 deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must  
 7 accompany the allegations; (4) the veracity of only the affiant must be challenged; and  
 8 (5) the challenged statements must be necessary to find probable cause.

9 765 F.3d 890, 894-895 (9th Cir.1985), amended on other grounds, 777 F.2d 543 (9th Cir.1985).

10           Under Franks, it is not enough for the defendant to attack the credibility of an  
 11 informant used in the affidavit. Pursuant to the Supreme Court's holding in Franks, an agent is  
 12 presumed to have truthfully presented an informant's statements and background. Whether the  
 13 informant provided truthful information is irrelevant as long as the agent reasonably believed the  
 14 informant and reported the informant's information accurately. Id. at 171-72. The defendant must  
 15 demonstrate a basis to believe that the affiant in failing to include information that the informant could  
 16 have told him acted with specific intent or reckless disregard in omitting critically relevant  
 17 information. As will be demonstrated below, defendant makes no showing of recklessness or  
 18 intentional omission on the part of the affiant. Id.

19           As to the confidential informant designated as CH1 in the affidavit, the affiant  
 20 disclosed that CH1 had worked as an informant for the FBI since 2004. CH1 had provided  
 21 information which the FBI has corroborated on multiple occasions, including information leading to  
 22 an arrest. In working with the FBI, CH1 hoped to mitigate the sentence he would receive for a crime  
 23 he had already plead guilty to committing. In his motion, defendant only “speculate[s] what has  
 24 motivated CH1 to act as an informant for five years, despite the alleged great personal danger CH1  
 25 faced.” Motion, at 2. As to the confidential informant designated at CH2, the affiant disclosed that  
 26 he had worked as an informant since the 1970s and information CH2 had provided had led to  
 indictments and convictions in criminal investigations. CH2 received financial subsistence for his  
 cooperation. Again in his motion, defendant only “imagine[s] what [CH2] is receiving for his labors  
 as a snitch and what he has done in violation of the law that compels him to be working as an

1 informant for longer than the average career civil servant (nearly 30 years).” Defendant provides  
2 nothing but speculation and conclusionary statements in his attack on the reliability of the informants.  
3 He does not meet the requirements of Franks to “make specific allegations, allege a deliberate  
4 falsehood or reckless disregard for the truth, and accompany such a claim with a detailed offer of  
5 proof.” United States v. Craighead, 539 F.3d 1073, 1080 (9th Cir. 2008). Significantly, defendant  
6 does not deny any of the representations of the informants the affiant includes in his search warrant  
7 affidavit. Defendant simply complains that the affidavit does not provide details of the informants’  
8 agreements with the FBI and their criminal backgrounds. In terms of the information the informants  
9 provided, defendant only contends that the affiant did not include information of the informants’  
10 repeated efforts to get defendant to provide them with auto sears and to show his machine gun.

11 Defendant contends that the affiant left out information concerning numerous  
12 occasions defendant refused to supply the confidential informant arms or auto sears. Defendant  
13 contends that the affiant should have included information demonstrating he was entrapped by the  
14 Government’s informant to commit the crimes charged. However, defendant in his affidavit in  
15 support of his motion to suppress does not state that he ever refused to provide auto sears to the  
16 confidential informant or undercover agent. While defendant does state that the confidential  
17 informant did repeatedly ask him to make auto sears to convert firearms into automatic weapons,  
18 defendant never indicates that he ever refused to make the auto sears. Motion, Exhibit A.

19 What defendant in his affidavit does clearly establish is that he made numerous auto  
20 sears/lightning links for the informant and undercover agent as the affiant outlined in his affidavit in  
21 support of the search warrant. These auto sears and lightning links were machine guns as the term  
22 is statutorily defined at Title 26, United States Code, Section 5845(b), in that they were “part[s]  
23 designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun.”  
24 Defendant in his affidavit also admits that he possessed a fully functional automatic weapon, but  
25 attempts to suggest that he normally kept the machine gun in pieces and only put it together and used  
26 it at the encouragement of the informant and undercover agent. However, whether in parts form or  
put together as an automatic weapon, defendant possessed a machine gun as the term is statutorily

1 defined. Title 26 United States Code 5845(b), further defines a machine gun to include “any weapon  
2 which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one  
3 shot, without manual reloading, by a single function of the trigger” and “any combination of parts  
4 from which a machinegun can be assembled if such parts are in the possession or under the control  
5 of a person.”

6 Defendant claims that he believed the auto sears and lightning links he manufactured  
7 were legal items because of ads in gun magazines advertising the sale of such items. However, as  
8 defined above, such items are illegal machine guns. Under the statutes charged, Title 18, United  
9 States Code, Section 922(o) and Title 26, United States Code, Section 5845(d), defendant does not  
10 need to know the illegal nature of the items he possessed; he merely needs to know the nature of the  
11 items he possessed. The statutes only require that the defendant have knowledge that the instrument  
12 he possessed was what the statute defines as a machine gun. United States v. Freed, 401 U.S. 601,  
13 607-09 (1971); United States v. Gravenmeir, 121 F.3d 526, 530 (9<sup>th</sup> Cir. 1997). As the Ninth Circuit  
14 explained in United States v. Gilbert, 286 Fed. Appx. 383, 386 (9<sup>th</sup> Cir. 2008):

15 In firearms prosecutions, the government is not required to prove that a defendant  
16 knew that his possession of the firearms at issue was unlawful. United States v. Freed,  
17 401 U.S. 601, 607, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971). Accordingly, the charges  
18 against [defendant] did not require, as an element of proof, evidence that [defendant]  
19 knowingly broke the law, only that he knowingly possessed weapons and knew the  
20 characteristics of those weapons.

21 Consequently, for purposes of evaluating probable cause, whether defendant knew or believed the  
22 items he manufactured or possessed were illegal to manufacture or possess is irrelevant and the issue  
23 is whether defendant knew the items he manufactured or possessed were: 1) weapons which shoot,  
24 are “designed to shoot, or can be readily restored to shoot, automatically more than one shot, without  
25 manual reloading, by a single function of the trigger;” or 2) “any part designed and intended solely  
26 and exclusively, or combination of parts designed and intended, for use in converting a weapon into  
a machinegun;” or 3) “any combination of parts from which a machinegun can be assembled.”<sup>1</sup>

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The Government also disputes defendant’s claim that he did not know that he was manufacturing contraband when he made the auto sears. As noted in the affidavit in support of search warrant at page 10, defendant on September 11, 2008, after supplying the first set of auto sears to the informant and

As for defendant's contention that the affiant left out information concerning the informant's repeated requests for defendant to make auto sears, establishing entrapment, the Government notes that entrapment is an affirmative defense. Entrapment is a defense excusing a defendant's conduct meeting the elements of a criminal statute. As a defense, entrapment is an issue for the jury to consider in reaching its verdict. While defendant's allegations concerning the informant's supposed repeated request for auto sears might be the basis for an entrapment defense, that potential affirmative defense does not change the fact that [the defendant engaged in criminal conduct at his residence], which is sufficient on its face for a finding of probable cause to issue a warrant. United State v. Christie, 570 F.Supp.2d 657, 672 (D.N.J. 2008); see also United States v. Marin, 138 Fed. Appx. 945 (9th Cir. 2005) Entrapment consequently is not relevant to the issue of determining probable cause to justify a search warrant. Adding defendant's alleged information concerning possible entrapment to the warrant affidavit does not change the probable cause analysis. "Whatever merit the entrapment defense may have at trial, it was not material to the question of whether a search warrant should be issued. Even had the magistrate judge been informed of these alleged unsuccessful attempts to engage [defendant] in [firearms transactions], the corroborated

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undercover agent, provided a manual that included specifications for building various auto sears type devices. Exhibit A, at 10. On the first page of the manual, under the index, is a "NOTICE" which states:

This book contains information that gives explicit details on the construction and/or conversion of fully automatic firearms.

This is offered as information for academic study only.

On May 19<sup>th</sup>, 1986, a new N.F.A. full-auto firearms law went into effect. As of that date it is no longer legal for an unlicensed individual to convert a semi-automatic firearm into a machinegun or sub-machinegun.

The B.A.T.F. Form 1 will not be accepted by the Bureau of Alcohol, Tobacco and Firearms if it was not postmarked by midnight, May 19, 1986.

Full-auto conversions listed in this book may legally be used only in TITLE II receivers by licensed TITLE II Manufacturers.

If you have any doubts about your positions in this matter, contact your local B.A.T.F. office for further information.

1 evidence supported probable cause to believe [the defendant] was violating [the law], and that  
2 evidence of this crime would likely be found during a search” of the defendant's residential property.  
3 United States v. McCollum, 2005 WL 3159662 (D. Neb.2005). Defendant “has identified no legal  
4 principle or authority which requires suppression of validly obtained evidence where entrapment is  
5 alleged.” United States v. Carroll, 1992 WL 333958 (D. Mass.1992).

6 Defendant argues that the affiant failed to include in the affidavit that defendant  
7 belonged to the Nevada Lawman Group, a lawful political organization protected by the First  
8 Amendment. The affiant, however, does reference defendant’s involvement in the Nevada Lawman  
9 Group (NL). While the affiant does generally reference some of the group’s anti-government political  
10 beliefs, the affiant makes clear that defendant and others involved in the group or related group were  
11 being investigated for fraudulent activities relating to the use of fraudulent promissory notes, bonds  
12 or other means of financial payment. The affiant includes information from CH2 and the undercover  
13 agent about defendant’s discussions concerning his personal use and knowledge of such fraudulent  
14 means of payment to pay the IRS and other debts and the filing of zero entry tax returns. Exhibit A,  
15 at 4, 5, 8-9, 11-12, 13-16. While defendant has not been charged with crimes concerning his  
16 involvement with fraud, the affidavit in support of the search warrant clearly provided sufficient  
17 information to justify searching defendant’s residence for evidence of his fraud.

18 Defendant also criticizes the affiant for failing to note the existence of a substantial  
19 legal question concerning whether defendant’s possession of the auto sears or machine gun were  
20 illegal under District of Columbia v. Heller, 554 U.S. \_\_\_\_ (2008). Defendant’s contention follows  
21 to some degree his position in his pending motion to dismiss. In his motion to dismiss, defendant first  
22 argues that under United States v. Stewart, 348 F.3d 948 (9<sup>th</sup> Cir. 2003), his possession of homemade  
23 auto sears and a machine gun was legal because defendant did not obtain his auto sears or machine  
24 gun using channels of interstate commerce. In the original 2003 decision in United States v. Stewart,  
25 the Ninth Circuit concluded that because the defendant there had made his machine gun rather than  
26 receive it through a transfer from another that the defendant’s possession of his machine gun was  
purely an intrastate possession which Congress could not regulate through the Constitution’s

Commerce Clause. The Court found that Title 18, United States Code, Section 922(o) was unconstitutional as applied to the defendant in that case. While arguably the Ninth Circuit's original decision in United States v. Stewart could apply to defendant's manufacturing of the auto sears and machine gun in his residence, the Ninth Circuit overruled its original decision on remand from the Supreme Court. In 2006, the Ninth Circuit ruled in United States v. Stewart, 451 F.3d 1071 (9<sup>th</sup> Cir. 2006), that Section 922(o) which criminalizes the possession of homemade machineguns manufactured intrastate was not an unlawful extension of Congress's commerce powers. Consequently, defendant's possession of what he contends were homemade auto sears and a machine gun is criminal under federal statute.

Defendant also claims that under District of Columbia v. Heller, the federal government cannot limit his possession of machine guns under the Second Amendment. However, courts considering the issue of the constitutionality of machine gun regulation since Heller have concluded that Congress can constitutionally regulate the possession of machine guns. In United States v. Gilbert, 286 Fed.Appx. 383, 386 (9th Cir.2008), the Ninth Circuit court explained that Heller did not undermine the restrictions contained in Title 18, United States Code, Sections 922(g)(1) and 922(o). In United States v. Fincher, 538 F.3d 868, 874 (8th Cir.2008), the Eighth Circuit held that Section 922(o) was a constitutional restriction on machine guns. See also United States v. Ross, 323 Fed. Appx. 117 (3d Cir. 2009); United States v. Williams, 2009 WL 578556 (W.D.Pa. 2009).

The Supreme Court in Heller found that the District of Columbia's complete ban on handgun possession in the home violated the Second Amendment. The Court held that the "Second Amendment conferred an individual right to keep and bear arms." Heller, 128 S. Ct., at 2799. However, the Court also made clear that this right is not unlimited:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.

Id., at 2816 (citations omitted). The Supreme Court stated that certain statutory restrictions on firearms are constitutional:

1 Although we do not undertake an exhaustive historical analysis today of the full scope  
 2 of the Second Amendment, nothing in our opinion should be taken to cast doubt on  
 3 longstanding prohibitions on the possession of firearms by felons and the mentally ill,  
 4 or laws forbidding the carrying of firearms in sensitive places such as schools and  
 5 government buildings, or laws imposing conditions and qualifications on the  
 6 commercial sale of arms.

7 We also recognize another important limitation on the right to keep and carry arms.  
 8 Miller [United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) ]  
 9 said, as we have explained, that the sorts of weapons protected were those “in common  
 10 use at the time.” 307 U.S., at 179, 59 S.Ct. 816, 83 L.Ed. 1206. We think that  
 11 limitation is fairly supported by the historical tradition of prohibiting the carrying of  
 12 “dangerous and unusual weapons.”

13 The Supreme Court in Heller did not find that possession of machine guns is protected  
 14 by the Second Amendment. “Machine guns are not in common use by law-abiding citizens for lawful  
 15 purposes and therefore fall within the category of dangerous and unusual weapons that the  
 16 government can prohibit for individual use.” United States v. Fincher, 538 F.3d 868, 873-74 (8th  
 17 Cir.2008); see also United States v. Gilbert, 2008 WL 2740453 (9th Cir.2008). Significantly, after  
 18 Heller, every court which has considered a Second Amendment challenge to the various subsections  
 19 of Section 922, including Section 922(o), has upheld the statute as constitutional. United States v.  
 20 Marzzarella, 2009 WL 90395 (W.D.Pa. Jan.14, 2009) (citing cases). These courts have concluded  
 21 that Heller does not establish an unconditional right to possess a firearm. Under Heller, defendant  
 22 has no right to possess a machine gun.

23 Defendant has provided no factual showing or legal basis to justify a Franks hearing  
 24 on his motion or to challenge the search warrant affidavit in this case. Defendant’s motion should be  
 25 denied

26 DATED this 24th day of September 2009.

Respectfully Submitted,

GREGORY A. BROWER  
 United States Attorney

/s/ J. Gregory Damm  
 J. GREGORY DAMM  
 Assistant United States Attorney